IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 640 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KASIM ABDUL SATTAR @ BIRIYANI GAZI

Versus

STATE OF GJARAT, NOTICE THRO CHIEF SECRETARY

Appearance:

1. Special Criminal Application No. 640 of 2003

MR KG VAKHARIA FOR MS AVANI S MEHTA for Petitioner No. 1-11

MR KAMAL B TRIVEDI, ADDL.ADV.GENERAL WITH MR AD OZA, PP assisted by MR PR ABICHANDANI, APP for Respondent No. 1

..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

Date of decision: 08/09/2003

C.A.V. JUDGEMENT

This petition has been filed by the petitioners praying for a writ of mandamus or a writ in the nature of

mandamus or any other appropriate writ, order or direction quashing and setting aside the notification dated 6th March, 2003 issued by the Government of Gujarat (Legal Department) in exercise of powers conferred under Sub-Section (1) and (4) of Section 23 of the Prevention of Terrorism Act, 2002 (Act No.15 of 2002) which was published in the Government of Gujarat Gazette (Extraordinary) on 6th March, 2003 (Part IV-A) (Annexure-A to the petition) as also the order dated 23rd May, 2003 passed by the Government of Gujarat [Home Department (Special)] (Annexure-B to the petition) in exercise of powers conferred by Sub-Section (1) of Section 268 of the Code of Criminal Procedure, 1973. It is also prayed that respondent No.2 be directed to hold the proceedings of POTA Case No.1 of 2003 in respect of petitioner Nos.1 to 5 and POTA Case No.2 of 2003 in respect of petitioner Nos.6 to 11 (C.R.No.I-9 of 2002 registered with Godhra Railway Police Station) at Godhra.

2. The case of the petitioners in short is that they are nationals and citizens of India and were working as labourers. The petitioner No.4 is a blind person. It is their case that they have been falsely involved in an incident of attack on the railway coach at Godhra alleged to have taken place on 27th February, 2002. Upon the arrest of petitioner Nos.1 to 5 between March and April, 2002 and petitioner Nos.6 to 11 between June and August, 2002, they were lodged in Vadodara Central Jail and on 17th May, 2003, they were sent to Sabarmati Central Jail, Ahmedabad. Out of 125 accused persons in C.R.No.I-9 of 2002 registered with Godhra Railway Police Station, 79 accused including present petitioners were arrested. Since three accused are juveniles, their trial was transferred to Juvenile Justice Court, Godhra where it was registered as Juvenile Case No.12 of 2002 and they were released on bail. Out of remaining 76 accused, 8 accused were released under Sec.169, Cr.P.C., two were released on bail by the Sessions Court, Panchmahals and two by the High Court and now 68 accused are in Sabarmati Central Jail. Charge-sheet was filed on 22nd May, 2002. The petitioner Nos.1 to 5 and the petitioner Nos.6 to 11 were produced on 15th June, 2002 and 20th September, 2002 respectively from Baroda Central Jail before the Court of Judicial Magistrate (First Class), Godhra (Railway) and their case was committed to the Court of Sessions. On 6th March, 2003, a notification was issued by the Legal Department in exercise of powers conferred under Sub-Sections (1) and (4) of Section 23 of the Prevention of Terrorism Act, 2002 (Act No.15 of 2002) (`the Act' for short) whereby a Special Court having headquarters of City Civil and Sessions Court, Bhadra, Ahmedabad, was

constituted for the case registered at Godhra Railway Police Station I.C.R.No.9 of 2002 and with the concurrence of the Chief Justice of High Court of Gujarat appointed Ms.S.G.Gokani, Judge, City Civil and Sessions Court, Ahmedabad, as the Judge to preside over the Special Court. On 17th May, 2003, an order Annexure-C was passed by the Government of Gujarat showing the names of 45 accused whereby it was directed that the accused shall not be removed from Ahmedabad Central Prison, Ahmedabad and on 23rd May, 2003, another order Annexure-B was passed by the Government of Gujarat (Home Department) in exercise of powers conferred under Sub-Section (1) of Section 268 of the Code of Criminal Procedure ('the Code' for short) showing the names of 20 accused persons including the present petitioners. Issuance of the aforesaid notification Annexure-A and order Annexure-B gives rise to the present petition.

3. It is stated by the petitioners that they reside at Godhra with their family members since the time of their predecessors and are falsely involved in the incident in question. It is further stated that charge-sheet has been filed in the Court on 22-5-2002 and accused are not being produced before the Court as per the report of police and jail authority. In respect of the case in question, Panchmahals Sessions Division has been established by the State of Gujarat in consultation with the High Court of Gujarat and C.R.No.I-9 of 2002 of Godhra Railway Police Station has been registered as POTA Case Nos.1/2003, 2/2003 and 5/2003 before the Special Court, City Civil and Sessions Court No.9, Ahmedabad. It is further stated that they were astonished when on 22-5-2003 the proceedings were held in Sabarmati Central Jail as they have not been communicated about the order Annexure-B having been passed till filling of petition and came to know only when copy is supplied on an application made by one of the accused. It is further stated that they belong to poor economic class and live belong the poverty line. Reproducing Sec.23 of the Act, it is stated that though State Government is vested with power under Sec.23(1) to constitute Special Court for the area or areas or for the group of cases, said power has been exercised specifying the case and not the area. The case is in respect of an incident alleged to have occurred within the territorial limits of Sessions Court, Panchmahals at Godhra and on reading Sec.23 as a whole, it is seen that the Government is not vested with the power to fix up the headquarter of Special Court. It is further stated that Sec.23(4) prescribes power of the Government in appointing a Judge of the Special Court and Sec.23(6) prescribes qualification. Putting Emphasize on

the words "in any State", it is stated that if a Sessions Judge or Addl. Sessions Judge in the States of Maharashtra or Himachal Pradesh or any other place in India appointed as a Special Judge was working immediately before his appointment as a Sessions or Addl. Sessions Judge as aforesaid, he/she would not have the jurisdiction to try the case of C.R.No.I-9 of 2002 of Godhra Railway Police Station at the place where his headquarter is situated but at the place where the incident has taken place. Hence, in present case, since Ms.S.G.Gokani, who is a sitting Judge of the City Civil and Sessions Court has been appointed as a Special Judge for the case in question, C.R.No.I-9 of 2002 of Godhra Railway Police Station would not by itself transfer within the limits of City Civil and Sessions Court. It is further submitted that the jurisdiction of the trial of the case in question would be the place where the offence is alleged to have taken place and, therefore, fixing the headquarter within the limits of City Civil and Sessions Court, Bhadra, Ahmedabad, vide aforesaid notification Annexure-A is beyond the scope, competence, authority and jurisdiction of the Government of Gujarat and hence, the impugned notification qua fixing the headquarter at the aforesaid place is illegal and ultra vires. It is further stated that Sec.24 of the Act makes it mandatory to conduct the proceedings of the Special Court at the ordinary place of sitting i.e. the place where the incident is triable and since no order under Sec.24 has been passed without hearing the accused, the proceedings be held at the place where the incident is alleged to have taken place. Secs.25(2) and (3) provide that power to transfer a case is vested with the Supreme Court or the High Court. It is stated that Sec.2(1) of the Act specifies that the words not defined in the Act but defined in the Code shall have the meaning respectively assigned to them in the Code and hence, as per Sec.177 of the Code, ordinary place of trial is the Court within whose local jurisdiction the offence is committed. It is further stated that if the offence in question is tried at Ahmedabad, petitioners will be deprived of availing the benefit of advocates of their choice and they being very economically poor will not be in a position to bear the expenses, anxiety and worry of the proceedings at a distance from their family members and, therefore, the impugned notification is arbitrary, irrational and violative of Articles, 14, 19 and 21 of the Constitution of India as well as the provisions of the Act and the Code.

3.1 As regards the impugned order at Annexure-B, it is stated that removal of petitioners from Baroda Central

Jail to Godhra, from Baroda Central Jail to Sabarmati Central Jail, production of petitioner Nos.1 to 5 and Nos.6 to 11 before J.M.F.C., Godhra (Railways) and J.M.F.C., Godhra respectively on 15-7-2002 and 20-9-2002, production of accused Nos.1 to 3 before the Sessions Court, Panchmahals, Godhra for trial on different dates in connection with Sessions Case No.133 of 2002 till their acquittal on 9-8-2002 and production of petitioner No.1 for trial in connection with Criminal Case Nos.1074 of 2002 and 1076 of 2002 before the J.M.F.C., Godhra (Railway) were without disturbance of any public order. It is further stated that eight accused were released under Sec.169 of the Code and four accused released on bail and to be tried with persons named in orders at Annexures-B and C have appeared before the Special Court on 22-5-2003, 3-6-2003 and 17-6-2003 at City Civil and Sessions Court, Ahmedabad, and were again called to appear on 30-6-2003. It is further stated that at the time when charge-sheet in the case was filed against some persons, they were produced before the Special Court. It is submitted that none of the aforesaid facts were taken into consideration while issuing the impugned orders Annexures-B and C. Showing Sr.No.15 of the impugned order Annexure-B, it is stated that though the said person has already been released on bail, his name was shown in the order which is a total non-application of mind. It is further stated that transfer of petitioners from Baroda Central Jail to Sabarmati Central Jail was with a mala fide intention to facilitate passing of the impugned order Annexure-B and passing of said order is against the provisions of Sec.327 of the Code and it is with a view to deprive the petitioners of a fair trial.

3.2 As regards the conduct of proceedings of the case in Sabarmati Central Jail, it is stated that presence of police commando with weapons and revolver creates an atmosphere of fear in the mind of petitioners and their relatives and hence, petitioners are not able to get any services of relatives and lawyers of their choice and hence, it is submitted that proceedings of the case in question should not be held in Sabarmati Central Jail. Though large number of accused was not there in serious cases like Limbadia Chawkdi involving death of 64 persons, Panderwala involving death of 20 persons, Kalol Police Station C.R.No.41 of 2002, Panchmahals District, involving death of 13 persons, no order under Sec.268(1) of the Code was passed and hence, passing of impugned order Annexure-B is discriminatory and violative of Articles 14, 19 and 21 of the Constitution of India. It is further submitted that non-communication of the order Annexure-B is with a mala fide intention to deprive the

petitioners of a fair trial. It is, therefore, submitted that both the impugned notification Annexure-A and order Annexure-B be quashed and set aside and proceedings in question be ordered to be held at Godhra.

4. An affidavit-in-reply affirmed by Shri J.R.Rajput, Deputy Secretary, Home Department, Sachivalaya, Gandhiangar, has been filed on behalf of respondent No.1(ii) contending inter alia that the Government of Gujarat is vested with power to fix the headquarters of Special Court under the Act. It is further contended that the provisions of Sections 177 and 178 of the Code will not come in picture in the present case. The contentions that the notification Annexure-A is illegal, ultra vires and beyond the scope of Section 23 of the Act and also violative of Articles 14, 19 and 21 of the Constitution of India and the provisions of the Code as regards the words "having headquarters of City Civil Court and Sessions Court, Bhadra, Ahmedabad" are also denied. It is further contended that as per Section 24 of the Act, hearing of the petitioners is not required before passing any order. The contentions that order at Annexure-B passed under Sec.268 of the Code is without application of mind and non-communication of the same vitiates the same are also denied. It is stated that State Government is doing purely administrative act involving no quasi-judicial factor and that said order is passed under the provisions of Sec.268 of the Code based on the report dated 12-5-2003 sent by concerned I.O. to the State Government stating that there is likelihood of disturbance of public order and safety of the accused persons including the petitioners if persons named in the said order are removed out of prison. It is contended that relevant considerations for issuance of order were public order and public interest. It is stated that the incident in question precipitated large-scale communal disturbances in the State of Gujarat and in order not to risk the public interest if accused are removed from the prison, order under Sec.268 of the Code was passed. It is stated that contentions as raised in para 6.2 of the petition are about 2 to 4 co-accused being produced before the Court for the formal or other dates. It is stated that the incident of setting on fire the S-6 coach of Sabarmati Express led to widespread communal disharmony in the State of Gujarat and therefore, taking more than 65 accused persons physically for trial risking their life in the Court premises at Godhra which is a communally sensitive area was likely to provoke communal tension and disturbance of public order and, therefore also, it was a fit case where passing of the order at Annexure-B was necessitated. It is further contended

that eight accused persons are released on bail cannot by itself lessen the seriousness of offence and cannot invalidate a well considered order passed under Sec.268 of the Code. As regards showing the name of an accused at Sr.No.15 in the order inadvertently, it is contended that a corrigendum delisting the said person and revoking the order qua said accused was issued. As regards transferring of the accused from Baroda Central Prison to Sabarmati Central Prison on 17th May, 2003, it is reiterated that lot of Bandobast had to be made having regard to the tension arising if petitioners had to be removed from the Baroda Central Prison and, therefore, trial of the train carnage wherein many accused have to be tried collectively for a single incident and which generated communal riots cannot be compared with isolated individuals namely, petitioner Nos.1, 2 and 3 being produced before the competent Court. It is, therefore, contended that there was nothing wrong in transferring petitioners on 17-5-2003 from Baroda Central Jail to Sabarmati Central Jail especially when a Special Court having its headquarter at Ahmedabad was constituted vide notification dated 6-3-2003 and hence, passing of the order under Sec.268 of the Code was well within the powers of State Government. It is contended that it is incorrect that the petitioners are unable to avail the services of lawyers of their choice to defend in the proceedings to be held in Sabarmati Central Jail more particularly when nearly 30 accused persons have already appointed advocates of their choice and also when Mr.Y.A.Chaka, an advocate appearing for some of the accused has assured the Special Court on 28th July, 2003 that almost all the accused would be represented by advocate. It is further contended that eminent lawyers are represented by various accused in various proceedings and application dated 17-6-2003 produced by the petitioner at page 92 seeking three months' time for engaging experienced and conversant advocates is relied upon in this respect. It is denied that holding of proceedings in the Sabarmati Central Jail is violative of Sec.27 and stated that juvenile accused would be tried by the juvenile Court as POTA is not invoked against them. As regards meting out discriminatory treatment to petitioners, it is contended that the incident was the one which triggered of the snowballing effect witnessed by the State and, therefore, case of the petitioners stands on a different footing. It is contended that in the cases like Limbadia, Pandelwala and Kalol, provisions of serious law like POTA was not invoked and hence, comparison of those cases with the case of the present petitioners would not arise. It is further stated that on the formal dates when accused were to be produced

before the competent Trial Court, since a tense atmosphere prevailed, additional forces from District Police, State Reserve Police Force and Border Wing Home Guards were to be deployed in order to avoid any untoward incident. It is contended that since some of the accused showed apprehension of their elimination in encounter, request was made by accused to various authorities including National Human Rights Commission to ensure that those apprehending accused may not be removed from prison. In these circumstances, it is contended that the order under Sec.268 passed in exercise of power was with application of mind, just, legal, proper and cannot be termed as discriminatory or with colourable exercise of power or arbitrary. It is also contended that non-communication of order at Annexure-B cannot be said to be issued with deliberate and mala fide intention. Regarding the averments made that the impugned order frustrates the provisions of Sec.327 of the Code, it is contended that it was expedient in the interest of the public at large to issue the impugned order to avoid likelihood of breach of public order. It is stated that Sec.30 of the Act empowers the Special Court to hold the trial in camera, however, the said Court would be an open Court. It is submitted that provisions of the Act would have overriding effect in the event of any conflict

5. An affidavit-in-rejoinder sworn by Hussain Bilal Mitha, a relative of the petitioner No.7, has been filed contending inter alia that the affidavit-in-reply filed by Shri J.R.Rajputh, Deputy Secretary, Home Department, is not an affidavit in the eye of law as he has not pointed his authority and competence to file said affidavit on behalf of officers and departments which issued the impugned notification and order and that he based his affidavit on the memo of petition with annexures and not the concerned files. It is contended that order Annexure-B is a repetition of Sub-Section (2) of Section 268 of the Code and facts which did not exist in the order in support of grounds mentioned in Sub-Section (2) cannot be brought by way of affidavit. The incident triggered off large scale communal riots is denied. In this connection, he has relied upon the report dated 1st April, 2002 of the National Human Rights Commission. It is submitted that the Bandh called by Vishwa Hindu Parishad and others supported by ruling political party BJP is responsible for the aftermath events. It is further submitted that likelihood of disturbance of public order upon the petitioners' removal from the prison is only a figment of imagination. It is contended that non-mentioning of report of I.O. dated 12th May, 2003 to the state Government in the impugned

notification and the order is indicative of the fact that order Annexure-C was passed prior to the report of I.O. It is further contended that since the affidavit-in-reply is based on perusal of memo of petition and its annexures, it cannot be presumed that he has seen the report of I.O. and when there is no reference of so-called report of I.O. either in the petition or in the annexures, incorporating the same at a later stage by way of affidavit amounts to misleading of Court and hence, he be dealt with strictly. It is further submitted that the alleged report of I.O. was got up or obtained under pressure subsequently to support the order Annexure-B and hence, said order be quashed and set aside. It is further submitted that the State Government has proceeded on the basis that the accused are required to be taken into special Court at Ahmedabad and not at Godhra in view of impugned notification. As regards the contention that Sessions court at Godhra is a communally sensitive area, it is stated that construction of buildings in Godhra one, for whole courts and the other, for fast track Courts at a cost of about Rs.5.00 crores would falsify this. It is further stated that in the nearby area of Sessions Court at Godhra, not a single incident of communal disturbance had occurred between 28th February and March/April, 2003. It is stated that Sec.9 of the Code requires the State Government to establish a Court of Sessions in every sessions division and the Court of Sessions is required ordinarily to hold its sitting at such place or places as the High Court may specify and while discharging this function, both the authorities ought to have considered the suitability of the place for holding the trial of all sorts of cases. It is denied that removal of 65 accused from the prison is likely to disturb the public order. As regards name of the accused at Sr.No.15 shown in the order, it is contended that no affidavit has been filed by the officer who passed the order qua accused No.15 about the inadvertent error committed by him and subsequent corrigendum does not absolve the impugned order from non-application of mind. It is denied that for removal of petitioners from Baroda Central Prison, lot of bandobast was required to be deployed. It is stated that the averments made in para 4.10 of the reply are contrary to the law laid down in A.K. Roy Vs. Union of India, AIR 1982 SC 710 and stated that the ratio laid down in the said case will be applicable in case of undertrial prisoners. It is stated that since there is a District Sub-Jail at Godhra, the petitioners and other accused could have been kept there. It is further stated that since there is a distance of 165 kms. from Godhra to Ahmedabad, due to their poor economic condition,

relatives and friends are not able to give active assistance and help to the petitioners. Briefing some facts, it is contended that the attempt of the State Government is to deprive the petitioners of their right to just and fair trial. The contention that 30 accused have appointed advocates of their choice out of which, some are given legal aid and four are on bail are incorrect. It is stated that the persons who engaged advocates face hardship, obstruction and inconvenience in attending the court proceedings at Sabarmati Jail as advocates of the accused are searched at the entrance of jail and their juniors and clerks are also not permitted inside whereas prosecution advocates and their assistants are given entry without search. Strongly relying upon the facts stated in the application dated 17th June, 2003, it is denied that the accused who have engaged advocates are eminent lawyers. Relying upon sec.304 of the Code, it is submitted that if the accused are to be given legal aid at the cost of the Government, they should be given choice to suggest the panel of three advocates and they must be paid fees not less than that are paid to Special Public Prosecutor or to Mr.J.M.Panchal, a leading advocate who, when appointed as a Special Prosecutor, was paid Rs.7,500/-per day plus conference charges etc. It is denied that conduct of proceedings of Special Court in Sabarmati Jail is without any competence or authority as no notification constituting the Court in Sabarmati Jail was issued nor any order under Sec.24 of the Act was passed after hearing the parties. It is submitted that when 65 accused of this case who were also accused in C.R.No.66 of 2002 of Godhra Town Police Station used to be brought from Sabarmati Central Jail and Baroda Central Jail to Godhra for 4-5 times for trial in August, 2002, neither was any untoward incident reported nor had any bandobast to be deployed and therefore, the say that deploying extra personnel from the District Police, State Reserve Police etc. is figment of imagination. It is stated that petitioners have never made any representation before any authority including National Human Rights Commission about apprehension of their safety on being removed from prison, but a representation was made that they may be encountered in jail itself. It is further stated that due to inhuman treatment, one accused namely, Fakruddin Yusuf died in Sabarmati Jail on 30-4-2003. It is prayed that a Court Commissioner be appointed to prepare map of Sabarmati Jail where the proceedings of Special Court take place wherein it can be seen that there are only four rows and 20 chairs placed out of which Prosecution occupies three chairs. An iron cage against the human dignity is erected for the accused

where they sit on the floor which is located at a great distance from the witness box making it impossible to take instructions from their advocates which, as a matter of fact, cannot be said to be a trial but a show of trial in presence of the accused. There is no canteen for the advocates who remain in Jail Court premises for the whole day. In the guise of jail rules, relatives and friends of accused are abstained from the court proceedings. It is submitted that conduct of proceedings in camera violates the provisions of Sec.327 of the Code and Article 31 of the Constitution of India as there is no order passed under proviso to Sub-Sec.(1) of Sec.327. It is further submitted that since there is no application made under Sec.30 of the Act, mention of said section was thoroughly misconceived. It is finally submitted that State Government is not vested with power to fix up the headquarter of Special Court and proceedings of Special Court are to be held at the place where the offences are committed and prayed that the petition be allowed.

6. An affidavit-in-sur-rejoinder affirmed by Mr.J.R.Rajput, Deputy Secretary, Home Department (Special), Sachivalaya, Gandhinagar, has been filed on behalf of respondent No.1(ii). It is stated therein that he is filing the same on going through the relevant record/files pertaining to the subject and on verifying from Shri Raj Kumar, Secretary to Government, Home Department (Special), Shri B.N.Shah, Under Secretary, Legal department as well as Shri A.B.Makwana, Sr.Jailor, Sabarmati Central Jail, Ahmedabad and on finding competent for dealing with the affidavit-in-rejoinder dated 28-7-2003 filed by Hussain Bail Mitha who is related to the petitioner No.7. Regarding the preliminary objection, it is contended that he has perused the relevant record and files relating to two orders and since he has been competent to file the affidavit-in-reply, same is an affidavit-in-reply in the eye of law. It is further reiterated that since the State Government has only acted on the administrative side without there being any quasi-judicial element, order under Sec.268 of the Code need not describe all the facts and hence, it is stated that the detailed facts stated in his affidavit-in-reply may not be regarded as supplement to the facts especially when the order itself is a speaking order. It is denied that the call for Gujarat Bandh by communal organizations is supported by ruling political party BJP and the alleged support is responsible for the aftermath events. It is stated that extract of the report of National Human Rights Commission cannot be taken on piecemeal and is irrelevant in the present case. It is further stated that he had perused

the report of I.O. before filing reply and denied the said report as being got up or obtained under pressure to support the order at Annexure-B. Regarding the contentions of Godhra being communally sensitive area, it is contended that he did not mean that when originally the particular place was specified for establishing Court of Sessions for holding its sittings, the said place was communally sensitive and it is to be tested in light of incident happened in Godhra and hence, it was thought fit to have the headquarters of Special Court at City Civil and Sessions Court premises, Bhadra, Ahmedabad so as to conduct the proceedings at a place desired by it namely Sabarmati Central Jail where more than 65 accused are to be tried in respect of Godhra Sabarmati Express carnage. It is further stated that if the absconding accused are traced, accommodating all the accused in Sub-Jail in Godhra which does not have a Central Jail would worsen the position and hence, looking to the gravity of the offence, all the accused are to be kept in Central Jail. As the reasons for keeping the sittings at Central Jail, Sabarmati are already stated in the earlier affidavit, it has nothing to do with the construction of new buildings at Godhra. It is contended that the situation prior to the carnage in question cannot and should not be brought in picture to apply to the present accused and an attempt has been made to show that Court of Sessions at Godhra is a secured place. It is further contended that when he is competent and authorized to file affidavit/s dealing with the petition as well as affidavits, filing of affidavit by respective persons who passed the notification and the order is not necessary. It is also contended that inadvertent error regarding inclusion of accused at Sr.No.15 cannot make the whole order being bad in law for remaining accused. As regards the citation of the Supreme Court, it is contended that the case before the Apex Court was transferring a detenu from one State to another and hence held that detenu should not be taken to a place other than his ordinary place of residing and hence, same is not applicable to the present case. It is submitted that present accused are permitted to meet their relatives or friends once in a week and sometimes even more. The contention that attempt is there to deprive the petitioners of their right to fair trial by the State Government and transfer of the petitioners from Vadodara Central Jail to Sabarmati Central Jail on 17-5-2003 was with such an intention is denied. It is stated that the proceedings in question at Central Jail, Sabarmati would be in the open Court as per Sec.327 of the Code. It is further stated that except a few, all accused have engaged the private advocates of their choice as they did not avail legal aid facility. As

regards search and entry restriction at the Jail premises, it is contended that same is done keeping in mind the safety and security of accused, advocates appearing in the case, their assistants, clerks, staff of the Court and armed guards. The entry of prosecution advocates and their assistants without any search is totally denied. It is further stated that the atmosphere in the jail premises is free and an advocate who is also an accused in the present case is allowed to assist other accused in communication with the advocates defending them. Not permitting the advocates to take instructions from their clients is also denied. It is stated that only the Hon'ble The Special Judge and the Special Pubic Prosecutor who are provided with armed guards for security reasons are permitted entry upto the Court house. It is further stated that petitioner Nos.1 to 6 vide their application dated 29-7-2003 prayed for legal aid though they have already engaged private advocates of their choice to defend in trial which is with an oblique motive to delay the trial and to make a show that they are not provided legal aid advocates of their choice as a result of which, Special Court is unable to proceed further. It is further stated that it is incorrect that all the accused used to be brought together from Sabarmati Central Jail and Vadodara Central Jail to Godhra before the trial Court for 4-5 times in the month of August, 2002 for trial in connection with C.R.66 of 2002 of Godhra Town Police Station and taking some out of 65 accused before the Trial Court at Godhra in August, 2002 cannot be equated with taking more than 65 accused. Death of Fakruddin Yusuf in Sabarmati Jail on 30-4-2003 due to inhuman treatment is also denied and stated that it was a natural death for which a magisterial inquiry was ordered. It is stated that merely because an iron bar partition is erected for security and safety reasons does not mean that accused are kept in so-called iron cage against human dignity and if it is seen from the other end, it could be said that even the Special Court, Public Prosecutor, advocates engaged by the accused person are placed in an iron cage. It is further stated that even Public Prosecutor and advocates are also sitting outside the said partition where many other accused are allowed to sit from where the assertions of the Special Court are much audible even to the last person sitting across the dais. It is finally contended that since none of the submissions, allegations, averments and contentions help the petitioners for adjudication of the controversy relating to the validity of the impugned notification and order, the petition be dismissed.

7. Heard Mr.K.G.Vakharia, learned Senior Counsel for Mrs.Avani Mehta, learned advocate for the petitioners and Mr.Kamal B.Trivedi, learned Addl. Advocate General for the respondent No.1.

8. At the time of arguments, learned Senior Counsel, Mr.Vakharia appearing for the petitioners, has made it clear that though the prayer for quashing and setting the notification Annexure-A as a whole was made in the petition, he is challenging only part of notification qua the place of sitting of Special Court.

8.1 It is mainly argued by Mr.K.G.Vakharia that power to constitute a Special Court is vested with the State Government under Sec.23 of the Act. According to him, Sec.23(1) of the Act empowers constitution of Special Court either for the area or areas or for the case or group of cases as may be specified in the notification and Government of Gujarat has exercised said power by constituting a Special Court for a particular case namely, C.R.No.9 of 2002 registered at Godhra Railway Police Station not specifying the area. On going through Sec.23, he has submitted that State Government is not vested with power to fix up the headquarters of Special Court but can be fixed depending upon occurrence of alleged incident. It is submitted that headquarters of Special Court is governed by provisions of Sections 177 and 178 of the Code without any modification as provided under Sec.49 of the Act. It is further submitted that on a joint reading of Sub-Sections (4) and (6) of Section 23 of the Act and the Code makes it apparent that no power is vested with the State Government to fix up the headquarters of Special Court if the words "in any State" as used in Sub-Section (6) of Sec.23 of the Act are properly construed. It is further submitted that appointment of Ms.S.G.Gokani as the Judge to preside over the Special Court constituted for the case being C.R.No.I-9 of 2002 will not automatically transfer the case of C.R.No.I-9 of 2002 within the limits of City Civil and Sessions Court, Ahmedabad because she was Sessions Judge at Ahmedabad City immediately prior to her appointment as a Judge to preside over the Special Court and hence, notification at Annexure-A is illegal as regards use of the words "having headquarters of City Civil and Sessions Court, Bhadra, Ahmedabad" for the case in question. Section 23(6) of the Act prescribes the qualification of a Judge of the Special Court which states that immediately before such appointment a person is holding the office of Sessions Judge or Additional Sessions Judge in any State. According to him, a Sessions Judge or an Additional Sessions Judge of any

State other than Gujarat is also qualified to be appointed as a Judge for the Special Court. It is submitted that the jurisdiction for trial will be the place where incident is alleged to have occurred and not the place where sitting of the Judge who has been selected as the Judge for the Special Court and therefore, the words "a Special Court having headquarters of City Civil and Sessions Court, Bhadra, Ahmedabad" are beyond the scope of Sec.23 of the Act and the words "having headquarters of City Civil and Sessions Court, Bhadra, Ahmedabad" are beyond competence, authority and jurisdiction of the Government of Gujarat. It is further submitted that Sec.24 of the Act provides that a Special Court is required to sit at its ordinary place of sitting and the ordinary place of sitting would mean the place where the offence has taken place. According to him, no order under Sec.24 has been passed by the Special Court and it cannot be passed without hearing the petitioners in respect of C.R.No.I-9 of 2002. It is further submitted that provisions of the Code are applicable to the proceedings under the Act. It is further submitted that section 2(1) provides that words and expressions used but not defined in this Act and defined in the Code shall have the meaning respectively assigned to them in the Code. It is also submitted that Sec.177 of the Code says that ordinary place of trial of an offence is the Court within whose local jurisdiction the offence was committed. In view of the above, it is submitted that the State Government has no power, authority or competence to fix up headquarter of the Special Court. It is submitted that putting the headquarter at City Civil and Sessions Court, Bhadra, Ahmedabad, will prejudice the defence of the petitioners and will deprive the petitioners of the services of lawyers of their choice as the petitioners, who are labourers and economically very poor from Godhra hardly know any lawyers in Ahmedabad inspiring confidence that they will be fearlessly defended and hence, fixing the headquarter at City Civil and Sessions Court, Bhadra, Ahmedabad, is arbitrary, unreasonable and violative of principles of natural justice. It is, therefore, prayed that notification at Annnexure-A is arbitrary, irrational and violative of Articles 14, 19 and 21 of the Constitution of India as well as the provisions of the Act and the Code.

8.2 It is further argued by Mr.Vakharia, learned Senior Counsel, that order at Annexure-B is issued with mala fide intention to deprive the petitioners of a fair trial. In this connection, it is submitted that petitioners, who were lodged in Baroda Central Jail till

17th May, 2003, were brought from Godhra and were sent to Sabarmati Central Jail without any disturbance of public order. It is further submitted that the petitioner Nos.1 to 5 and the petitioner Nos.6 to 11 were produced before the Judicial Magistrate (First Class), Godhra on 15th July, 2003 and 20th September, 2002 respectively when case was committed to the Court of Sessions. It is further submitted that the petitioner Nos.1, 2 and 3, who, along with other accused lodged in Central Ahmedabad and Central Jail, Baroda and who were accused in Sessions Case No.133 of 2002, were produced before the Sessions Court, Panchmahals at Godhra on different dates for trial without any disturbance of public order and those with other accused were acquitted by the judgment dated 9th August, 2002.

8.3 It is further argued that four accused released on bail are also tried along with other accused persons whose names are shown in the order at Annxures-B and C while eight accused are released on executing the bond under Sec.169 of the Code. Other persons accused in C.R.No.I-9 of 2002 have appeared on 22-5-2003, 3-6-2003 and 17-6-2003 before the Special Court at City Civil and Sessions Court, Ahmedabad. It is further submitted that there is non-application of mind on the part of State Government in passing the order Annexure-B in view of the fact that Sr.No.15 of the order shows the name of Edrish Abdulla Umarjin Shaikh who has been released on bail by the Addl. Sessions Judge, Panchmahals at Godhra and since the said order has been passed without hearing the petitioners, there is violation of principles of natural justice and breach of Articles 14, 19 and 21 of the Constitution of India. It is further submitted that petitioners were shifted from Baroda Central Jail to Sabarmati Central Jail on 17th May, 2003 only for facilitating in passing of the order at Annexure-B and said order is passed with a mala fide intention and to frustrate the provisions of Sec.327 of the Code and to deprive the petitioners of their right of just and fair trial as the impugned order has not been communicated to the petitioners and hence, the order at Annexure-B is discriminatory and violative of Articles 14, 19 and 21 of the Constitution of India.

8.4 It is finally submitted by learned counsel for the petitioners that since both the notification, Annexure-A and the order at Annexure-B are passed without hearing the petitioners, they are arbitrary, malafide and with an ulterior motive to deprive the petitioners of just and fair trial and hence prayed that they may be quashed. It is also prayed that the respondent No.2 be

directed to hold the proceedings of POTA Case No.1 of 2003 in respect of petitioner Nos.1 to 5 and POTA Case No.2 of 2003 in respect of petitioner Nos.6 to 11(C.R.No.I-9 of 2002 registered with Godhra Railway Police Station) at Godhra.

8.5 To support the contentions and the arguments, Mr.Vakharia has relied upon the case of Director of Enforcement Vs. Deepak Mahajan and another, AIR 1994 S.C. 1775, at head note 'F' which reads as under:

"Criminal P.C.(2 of 1974), Ss.4(2), 167--Scope and applicability--Operation of S.4(2) is attracted to area of investigation, inquiry and trial of offence under special laws, including Foreign Exchange Regulation Act and Customs Act--Consequently S.167 can also be made applicable during investigation or inquiry of offence under Special Act."

He has also drawn my attention upon paras 132, 131 which read as under:

"The operation of S.4(2) of the Code is straightway attracted to the area of investigation, inquiry and trial of the offences under the Special laws including the FERA and Customs Act and consequently S.167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of S.167."

He has also drawn my attention towards para 127. Para 127 is as follows:

"Section 4 is comprehensive and that S.5 is not in derogation of S.4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of S.4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of S.4(2) itself limits the application of the provisions of the Code reading, "..... but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.""

It is observed by the Apex court in the aforesaid judgment that in the absence of any specific provision in the Act, provisions of the Code will be applicable.

8.6 He has also relied upon the case of A.K.Roy Vs. Union of India and another, AIR 1982 S.C. 710 more particularly towards head note (P) which reads as under:

> "National Security Act (65 of 1980), S.5--Detention in "such place"--Normal rule to be followed."

He has drawn my attention towards paras 74 and 75 which read thus:

> "It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Immediately after a person is taken in custody in pursuance of an order of detention, the members of his household preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time."

It is held by the Apex Court in the aforesaid reported case that normally the detenu would be detained at the ordinary place of residence. But in exceptional cases

due to administrative convenience, safety and security, detenu can be transferred to a place other than the ordinary place of residence.

8.7 He has also relied upon the case of Bharatbhai Bhagwanjibhai Vs. State of Gujarat, (2002)8 S.C.C. 327.

8.8 He has also relied upon the case of Gangula Ashok and another Vs. State of A.P., (2000)2 S.C.C. 504 more particularly towards paras 10 and 11 which read as under:

"Section 193 of the Code has to be understood in the aforesaid backdrop. The section imposes an interdict on all Courts of Session against taking a cognizance of any offence as a court of original jurisdiction. It can take cognizance only if "the case has been committed to it by a Magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting those exceptions is indicative of the legislative mandate that a Court of session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate. neither in the Code nor in the Act is there any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a court of original jurisdiction without the case being committed to it by a Magistrate. As such the charge-sheet or complaint cannot straight away be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of criminal courts that the Court of Session is given a superior and special status. Hence the legislature would have thoughtfully relieved the Court of Session from the work of performing all the preliminary formalities which Magistrates have to do until the case is

committed to the Court of Session."

He has also drawn my attention towards paras 12 to 14 which read as under:

"Contentions based on Sections 4 and 5 of the Code as suggesting that a departure from Section 193 of the Code is permissible under special enactments cannot be accepted. Section 4(2) CrPC makes it clear that if another enactment contains any provision which is contrary to the provisions of the Code, such other provision would apply in place of the particular provision of the Code. If there is no such contrary provision in other laws, then provisions of the Code would apply to the matters covered thereby. Section 5 of the Code cannot also be brought in aid for supporting the view that the Court of Session specified under the Act can obviate the interdict contained in Section 193 of the Code as long as there is no provision in the Act empowering the Special Court to take cognizance of the offence as a court of original jurisdiction."

The Apex Court in the aforesaid reported judgment has held that as per Sec.4(2) of the Code, if another enactment contains any provision which is contrary to the provisions of the Code, such other provision would apply in place of the particular provision of the Code.

8.9 He has also relied upon AIR 2001 S.C. 1490 reported in the case of Mohan Baitha and others Vs. State of Bihar and another.

9. Mr.Kamal B.Trivedi, learned Additional Advocate General appearing for the respondent No.1, has contended the same which have been putforward in the propositions submitted on behalf of the State. It is mainly contended that the Act being a special law has overriding effect on all the enactments including the Code. On reading provisions of Sec.23 with that of Sec.25 of the Act, it is contended that provisions of sections of Chapter IV of the Act empower the State Government to constitute a Special Court for a particular case at any place and hence, issuance of notification Annexure-A in exercise of the powers conferred under Sub-Sections (1) and (4) of Sec.23 of the Act by the State Government constituting a Special Court having headquarters of City Civil & Sessions Court, Bhadra, Ahmedabad and appointing Ms.S.G.Gokani, Judge, City Civil & Sessions Court, Ahmedabad, as the Judge to preside over the said Special

Court is legal and proper. Since a particular Sessions Court with headquarter is specified to act as a Special Court under the Act in the impugned notification, it cannot be stated that State Government is not empowered to fix the headquarter of particular Sessions Court to be the Special Court under the Act vide the impugned notification. It is clarified that a particular Sessions Court of a particular area is identified in the notification to act as a Special Court for a particular case i.e. I.C.R.No.9 of 2002 registered with Godhra Railway Police Station. Since there is no express prohibition/embargo against fixation of the headquarter, reading of such a prohibition/embargo in Sec.23 of the Act would be rewriting the said section. It is contended that provisions of Sec.177 of the Code have been framed by the Legislature thoughtfully by using precautionary word 'ordinarily' to indicate that the rule is not invariable in all cases. According to him, if Sec.177 is read side by side with Sec.9(6) of the Code, it can be said that they do not apply to a Special Court constituted under the Act. It is further contended that a perusal of the provisions of Sec.24 clearly shows that it is the discretion of the Special Court on its own motion to sit for any of its proceedings at any place other than its ordinary place of sitting and it is in this context the Special Court has observed in its order dated 22-5-2003 as under:

> "The accused of Special POTA Case No.1/03, 2/03 and 3/03 after having been committed to the judicial custody were not brought before the Court and therefore, the Court on issuance of the notices had decided to fix the matter at Sabarmati Central Jail in wake of the invocation u/s 268 of Cr.P.C. dt. 07.5.2003 which was in respect of nearly 45 accused of Special POTA Case No.1/03."

It is further contended that on earlier occasion also, the Special Court has passed similar order fixing the matter at Sabarmati Central Jail qua 45 accused who were shown in the order dated 7-5-2003 at Annexure-C issued under Sec.268 of the Code. It is further contended that Sec.24 of the Act does not stipulate hearing of accused for fixing up the place of trial nor passing of any order and, therefore, the contentions in this regard made by the learned counsel for the petitioners would amount to rewriting the said section. It is further contended that provisions of other special legislations like Secs.36(1) and 36-A(1)(a) of NDPS Act, 1985, Secs.12-A and 12(AA)(a) of Essential Commodities Act, 1955 and Sec.14 of the

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also provide for constitution of a Special Court for the specified areas and not for a particular case where all offences under those legislations are triable for the area in which offence has been committed. Since the Special Court constituted under the Act has wider discretion regarding fixation of "place of sitting for trial" than the one constituted under aforesaid legislations, selecting Sabarmati Central Jail, Ahmedabad as the place of sitting for trial in view of orders dated 7-5-2003 and 23-5-2003 is eminently just and proper. It is further contended that since Sec.49 of the Act lays down modification in respect of some provisions of the code, it does not mean that remaining provisions of the Code will mutatis mutandis apply in all cases of the Act. In those cases, since the Act has an overriding effect, the provisions of the Act which are inconsistent with similar provisions of the Code shall prevail over the provisions of the Code. It is also contended that although similar order dated 7-5-2003 (Annexure-C) issued under Sec.268 of the Code was already there in respect of 45 accused who, since the date of arrest, were in Sabarmati Central Jail, said order is not challenged but, only the order dated 23-5-2003 Annexure-B issued under Sec.268 of the Code in respect of 19 accused including the present petitioners who, at the relevant time, were in Baroda Central Jail is challenged. In view of the aforesaid, it is submitted that order Annexure-B does not require detailed facts and grant of personal hearing to the parties and it is an administrative order passed by the State Government without involving any quasi-judicial element.

9.1 In support of his submissions, Mr.Kamal Trivedi, learned Addl. Advocate General for the respondent-State has relied upon the case of Chandra Gupta, I.F.S. Vs. The Secretary, Govt. of India, Ministry of Environment and Forests and others, AIR 1995 S.C. page 44 more particularly towards para 32 wherein the Apex Court has reproduced the observations made at page 46 of the case of Union of India Vs. E.G.Nambudiri, (1991)3 S.C.C. 38, part of which reads as under:

> "There is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a government servant against the adverse entries the competent authority is not under any

obligation to record reasons. But the competent authority has no licence to act arbitrarily, he must act in a fair and just manner."

9.2 He has also relied upon the case of Sultan Singh Vs. State of Haryana and another, (1996)2 S.C.C. 66 wherein it has been held in para as under:

"The appropriate Government is entitled to go into the question whether an industrial dispute exists or is apprehended. It would be only a subjective satisfaction on the basis of the material on record. Being an administrative order no lis is involved. Therefore, there is neither any need to issue any notice to the employer nor to hear him before making a reference or refusing to make a reference. Sub-section (5) of section 12 of the Act does not enjoin the appropriate Government to record reasons for making reference under Section 10(1). It enjoins to record reasons only when it refuses to make a reference."

9.3 He has also relied upon another case of M.J.Sivani and others Vs. State of Karnataka and others, (1995)6 S.C.C. 289 wherein it has been held in para 32 as under:

"When rules direct to record reasons, it is a sine qua non and condition precedent for a valid order. Appropriate brief reasons, though not like a judgment, are a necessary concomitant for a valid order in support of the action or decision taken by the authority or its instrumentality or the State. Normally it must be communicated to the affected party so that he may have an opportunity to have it tested in an appropriate forum. The order need not contain detailed reasons like a court order. Administrative order itself may contain reasons or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue. It would be discernible from the reasons stated in the order or the contemporaneous record. Reasons are the link between the order and the mind of its maker."

9.4 He has also relied upon (1997)9 S.C.C. 78 reported in the case of Union of India and Others Vs. Praveen Gupta and Others wherein in para 9, it has been held by the Apex Court as under:

"Decision on urgency is an administrative decision and is a matter of subjective satisfaction of the appropriate Government on the basis of the material available on record. Therefore, there was no need to pass any reasoned order. "

9.5 He has also relied upon the case of Secretary, Indian Tea Association Vs. Ajit Kumar Barat and others, (2000)3 S.C.C. 93, wherein the Apex Court delivered the judgment relying upon the case of Sultan Singh (supra). Head note 'B' of the said judgment reads as under:

"B.Labour Law--Reference--Order of the appropriate Government refusing to make, after deciding that the employee concerned was not a workman--Nature of such order and scope of judicial review thereof by High Court--Such an order, held, is an administrative order--Hence, where made after taking into consideration the salary and allowances drawn by the employee concerned at the relevant time and the nature of his work, and without taking into consideration any irrelevant matter, held, could not be faulted--Hence, High Court's direction to the State Government to make a reference in the instant case, set aside--industrial Disputes Act, 1947, Ss.10, 12(5), 2(k) and (s)--Constitution of India, Art.226--Interference in labour matters--Administrative Law--Administrative orders--Scope of judicial review of, under Art.226."

9.6 He has also relied upon a decision of this Court (Coram: D.P.Buch,J.) delivered in the case of Aniruddhsinh Mahipatsinh Jadeja Vs. State of Gujarat vide judgment dated 22-11-2002 passed in Special Criminal Application No.503 of 2001 which has been confirmed by a Division Bench of this Court (Coram: K.R.Vyas and M.S.Shah,JJ.) vide judgment dated 18-6-2003 delivered in Letters Patent Appeal No.126 of 2003.

10. Before I proceed with the matter, some relevant facts may briefly be stated. The incident of attack on Railway coach at Godhra took place on 27-2-2003 wherein several people died and many people injured. A complaint to that effect was lodged with Godhra Railway Police Station which has been numbered as C.R.No.I-9 of 2002 at said Police Station. In the said case, 125 persons were shown as accused out of which, 79 were arrested and rest

of the accused are absconding. In view of the report of the investigating authority, eight accused were released under Sec.169 of the Code. Two accused were released on bail by the Sessions Court and two by the High Court. The three juvenile accused were also released on bail. Out of the remaining accused in the judicial custody, 20 accused were kept in Baroda Central Jail and other accused were kept in Sabarmati Central Jail. Charge-sheet in the case was filed on 22-5-2002. On 6th March, 2003, a notification was issued by the Government of Gujarat (Legal Department) under sub-sections (1) and (4) of Section 23 of the Act constituting a Special Court having headquarters of City Civil and Sessions Court, Bhadra, Ahmedabad and appointing Ms.S.G.Gokani, Judge, City Civil and Sessions Court, Ahmedabad as the Judge to preside over the Special Court with the concurrence of the Hon'ble Chief Justice of the High Court of Gujarat. Consequent upon the issuance of aforesaid notification, C.R.No.I-9 of 2002 of Godhra Railway Police Station has been registered as POTA Case Nos.1/2003, 2/2002 and 3/2003. Thereafter on 17th May, 2003, an order (Annexure-C) was passed by the Government of Gujarat (Home Department) against 45 accused who were already kept in Sabarmati Central Jail. Thereafter on 23rd May, 2003, another order (Annexure-B) qua 20 accused including the present petitioners who were shifted from Baroda Central Jail to Sabarmati Central Jail was passed by the Government of Gujarat (Home Department) under Sub-Section (1) of Section 268 of the Code. The present petitioners have challenged the notification dated 6-3-2003 (Annexure-A) as also the order dated 23-5-2003 (Annexure-B) by way of the present petition.

11. The contentions raised in the respective pleadings and arguments advanced by the learned counsel appearing for the respective parties have been detailed hereinabove and hence, same are not reproduced again here to avoid repetition. For the purpose of determining the points involved in the present petition, provisions of various Sections of Chapters IV and VI of the Act more particularly Secs.23, 24, 25, 49 and 56, and Secs.9(6), 177 and 178 of the Code are required to be borne in mind.

12. Perusal of notification Annexure-A shows that it has been issued in exercise of powers conferred under Sub-Sections (1) and (4) of Section 23 of the Act. Section 23 reads as under:

> "23. Special Courts.--(1) The Central Government or a State Government may, by notification in the Official Gazette, constitute one or more Special

Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where a notification constituting a Special Court for any area or areas or for any case or class or group of cases is issued by the Central Government under Sub-section(1), and a notification constituting a Special Court for the same area or areas or for the same case or class or group of cases has also been issued by the State Government under that sub-section, the Special Court constituted by the Central Government, whether the notification constituting such Court is issued before or after the issue of the notification constituting the Special Court by the State Government, shall have, and the Special Court constituted by the State Government shall not have, jurisdiction to try any offence committed in that area or areas or, as the case may be, the case or class or group of cases and all cases pending before any Special Court constituted by the State Government shall stand transferred to the Special Court constituted by the Central Government.

(3) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.

(4) A special Court shall be presided over by a judge to be appointed by the Central Government or, as the case may be, the State Government, with the concurrence of the Chief Justice of the High Court.

(5) The Central Government or, as the case may be, the State Government may also appoint, with the concurrence of the Chief Justice of the High court, additional judges to exercise jurisdiction of a Special Court.

(6) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court unless he is, immediately before such appointment, a sessions judge or an additional sessions judge in any State.

(7) For the removal of doubts, it is hereby provided that the attainment, by a person

appointed as a judge or an additional judge of a Special Court, of the age of superannuation under the rules applicable to him in the service to which he belongs, shall not affect his continuance as such judge or additional judge.

(8) Where an additional judge or additional judges is or are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order, in writing, provide for the distribution of business of the Special Court among all judges including himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge."

Sec.23(1) empowers the Government to constitute Special Court either for such area or areas, or for such case or class or group of cases, as may be specified in the notification. It reflects from Annexure-A that the State Government has issued the notification under Sec.23(1) of the Act constituting a Special Court for such case i.e. Godhra Railway Police Station C.R.No.I-9 of 2002 and under Sec.23(4) appointed Ms.S.G.Gokani, Judge, City Civil & Sessions Court, Ahmedabad as a Judge to preside over the Special Court with the concurrence of the Chief Justice.

13. In short, powers conferred upon the State Government under the provisions of Sub-sections (1) and (4) of Section 23 of the Act have not been denied by the learned Senior Counsel for the petitioners, Mr.K.G.Vakharia. According to him, Sec.23 nowhere provides power to fix the headquarter of Special Court. Further, fixing the headquarter of the Special Court inter alia, the place of trial of the case, is governed by the provisions of Secs.177 and 178 of the Code without any modification as provided under Sec.49 of the Act. It is further contended that on reading of Sec.23 as a whole together with the provisions of the Act, State Government is not vested with any power to fix the headquarter of the Special Court and if the words "in any State" as used in sub-section (6) of section (9) are properly construed, the aforesaid intention would be clear. It is further contended that if a Sessions Judge or an Additional Sessions Judge in any State is appointed as a Special Judge with the concurrence of the Chief Justice, he will not get the jurisdiction to try the case in respect of C.R.No.I-9 of 2002 of Godhra Railway Police Station at the place of his headquarter but he is required to hold

the sitting of the Special Court at the place where the incident is alleged to have occurred.

14. Plain reading of Sec.23(1) of the Act makes it abundantly clear that Central Government or a State Government may, by notification in the Official Gazette, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification. Sec.23(4) also makes it clear that a Special Court shall be presided over by a Judge to be appointed by the Central Government or, as the case may be, the State Government, with the concurrence of the Chief Justice of the High Court. In the present case, vide notification Annexure-A, Special Court for such case i.e. Godhra Railway Police Station C.R.No.I-9 of 2002 has been constituted and Ms.S.G.Gokani, Judge, City Civil and Sessions Court, Bhadra, Ahmedabad has been appointed as a Judge to preside over the said Special Court with the concurrence of the Chief Justice. Sec.23(1) of the Act empowers the State Government to do so for such case as may be specified in the notification and, therefore, issues get narrowed down qua notification Annexure-A as to whether the State Government is empowered by way of Sec.23(1) of the Act or by any other provisions of the Act to fix the headquarter of the Special Court or as to whether the trial is required to be conducted at a place where the alleged incident has taken place.

15. In this connection, Sec.25 of the Act is to be seen. Sec.25 reads as under:

"25.Jurisdiction of Special Courts.-- (1) Notwithstanding anything contained in the Code, every offence punishable under any provision of this Act shall be triable only by the Special Court within whose local jurisdiction it was committed or, as the case may be, by the Special Court constituted for trying such offence under section 23.

(2) If, having regard to the exigencies of the situation prevailing in a State,--

(a) it is not possible to have a fair, impartial or speedy trial; or

(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public

Prosecutor and a judge of the Special Court or any of them; or

(c) it is not otherwise in the interests of justice,

the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India, be supported by an affidavit or affirmation."

Sec.24 of the Act speaks about the sitting of the Special Court which reads thus:

"24. Place of sitting.-- A Special Court may, on its own motion, or on an application made by the Public Prosecutor and if it considers it expedient or desirable so to do, sit for any of its proceedings at any place other than its ordinary place of sitting."

Under this section, discretion is conferred upon the Special Court to sit for any of its proceedings at any place other than its ordinary place of sitting on its own motion or on an application made by the Public Prosecutor. However, said discretion to change the place of sitting of a Special Court constituted by a State Government to any place is limited to the State as per proviso to Sec.24 which reads as under:

"Provided that nothing in this section shall be construed to change the place of sitting of a Special Court constituted by a State Government to any place outside that State."

In this regard, Secs.9(6), 177 and 178 of the Code are required to be kept in mind. Sec.9(6) states thus:

"The Court of Session shall ordinarily hold its sitting at such place or places as the High Court

may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein."

Sections 177 and 178 are as follows:

"177. Ordinary place of inquiry and trial.-Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

178. Place of inquiry or trial.-- (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

16. Joint reading of Sec.25 more particularly Section 25(1) together with Sec.23(1) of the Act makes it amply clear that every offence punishable under any provision of this Act shall be triable only by the Special Court within whose local jurisdiction it was committed or, as the case may be, by the Special Court constituted for trying such offence under section 23. The words "by the Special Court constituted for trying such offence under section 23" would be most relevant. Once the Special Court has been constituted by the State Government for trying such an offence under Sec.23 of the Act by a notification, it is entitled to fix the place of trial also and said Special Court, as has been specified in the notification, is empowered to try such an offence. Moreover, the words "to change the place of sitting of a Special Court constituted by a State Government" as mentioned in proviso to Section 24 state about change

that can be effected by the Special Court in the place of sitting fixed by the State Government. Joint reading of Sec.24 together with Sec.23 also makes it amply clear that State Government has power to fix the place of sitting. Thereafter, power is vested with the concerned Judge who presides over as a Special Court on its own motion or on an application made by the Public Prosecutor to change the place of sitting within the State. However, Sec.24 of the Act does not contemplate grant of hearing of the accused persons for fixing of the place of trial or even does not contemplate passing of any order. Under the circusmtances, passing of the order and grant of hearing before fixing the place of trial are not required. Vide Sec.49 of the Act, it is true that certain modification has been done in certain sections of the Code and, therefore, above referred sections will be applicable with modification subject to Sec.56 of the Act. It is also not in dispute that Code will also be applicable in respect of some provisions of the Code and it does not mean that other provisions of the Code will be applicable equally in all cases of the Act.

17. In view of the express provisions in the Act for constitution of Special Court and for fixing its place of sitting, I am of the opinion that Sections 9(6), 177 and 178 of the Code would not be applicable in this case in view of overriding effect under Sec.56 of the Act over the Code. Sec.56 of the Act states that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or in any instrument having effect by virtue of any enactment other than the Act. Therefore, the contention of Mr.Vakharia that Secs.177, 178 and 9(6) of the Code will be applicable to the present case gets negatived. It is also the contention of Mr.Vakharia that provisions of other special legislations like Secs.36(1) and 36-A(1)(a) of NDPS Act, 1985, Secs.12-A and 12(AA)(a) of Essential Commodities Act, 1955 and Sec.14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also provide for constitution of a Special Court. However, those special legislations are for the specified areas and not for a particular case where all offences under those legislations are triable for the area in which offence has been committed. Since the Special Court constituted under the Act has wider discretion regarding fixation of place of sitting for trial than the one constituted under aforesaid legislations, this contention of Mr.Vakharia also gets negatived. In view of the aforesaid, I am unable to accept the contentions raised and the arguments advanced by the learned counsel for the petitioners that the

notification Annexure-A is either illegal, arbitrary, ultra vires, without authority, competence or jurisdiction. Over and above, since the place of conducting the trial of POTA Case Nos.1/2003, 2/2002 and 3/2003 at Central Jail, Sabarmati by the Judge who presides over the Special Court is as provided under proviso to Sec.24 of the Act, he/she is entitled to do so with the restriction to change the place of sitting within the State and hence, said action of the learned Special Judge can also not be said to be illegal.

18. The petitioners have also challenged the order Annexure-B dated 23-5-2003 passed by the State Government under Sec.268 of the Code mainly on the grounds that it has been issued with mala fide intention to deprive the petitioners and other accused a just and fair trial and that the same is not a reasoned order but only a reproduction of Sub-Section (2) of Sec.268 of the Code and hence prayed to quash and set aside the same.

19. Whereas the respondent-State has contended that order dated 23-5-2003 Annexure-B has been passed relying upon the report dated 12-5-2003 of the I.O. concerned to the State Government and it is only an administrative order and no quasi-judicial factor is involved in it.

20. Learned counsel for the respective parties have relied upon various judgments on the points involved in the petition which have also been reproduced hereinabove. Keeping in mind the proposition of law laid down in those judgments and the arguments advanced on behalf of the respective parties, I am deciding this point.

21. It clearly appears from the reply filed by Shri J.R.Rajput, Deputy Secretary, Home Department, Sachivalaya, Gandhinagar, that the State Government has passed order dated 7-5-2003 under Sec.268 of the Code in respect of other 45 accused who were already in Sabarmati Central Jail, Ahmedabad at the time when present petitioners and other accused were in Baroda Central Jail and they were shifted to Sabarmati Central Jail on 17-5-2003. Thereafter the State Government has passed the order dated 23-5-2003 under Sec.268 of the Code on the basis of the report dated 12-5-2003 of the Investigating Officer concerned submitted to the State Government setting out the reasons of likelihood of disturbance of public order, safety of the accused including the petitioners and on finding that it was absolutely necessary to avoid the disturbance of public order.

22. As against this, learned counsel for the petitioners has contended that it is not the first time that the the petitioners and other accused who were kept in Baroda Central Jail were transferred but on various earlier occasions also, they have been transferred from Baroda Central Jail to Godhra without disturbance of any public order to keep them present as has been narrated in detail by the petitioners in the petition at para 6(2).

23. However, in the reply at para 4.6, it has been made clear by the Deputy Secretary, Home Department, that all the accused were not shifted at a time from Baroda Central Jail to Godhra but only 2-4 accused were taken from Baroda Central Jail to Godhra. It has further been made clear that it would be difficult to remove all the 65 accused at a time from the prison to keep present in the instant case before the Trial Court and if they will be removed then there will be likelihood of disturbance of public order and possibility of risking safety of accused persons. According to learned Add. Advocate General, all the aforereferred aspects have been taken into consideration.

24. Under the circumstances, when there is a report of I.O. with other materials on record of the competent authority while passing the order, it cannot be said that the order in question has been passed mala fidely to deprive the petitioners and other accused a fair trial. As regards the questions as to whether the order Annexure-B passed by the authority is a reasoned order and whether opportunity of hearing is to be granted to the concerned parties, the law laid down by this Court as well as the Apex Court in this respect has to be gone into. It has been held by the Apex Court in para 9 of the judgment reported in (1997)9 S.C.C. 78 as follows:

> "Decision on urgency is an administrative decision and is a matter of subjective satisfaction of the appropriate Government on the basis of the material available on record. Therefore, there was no need to pass any reasoned order to reach the conclusion."

25. When similar question has come up before this Court, this Court (Coram: D.P.Buch,J.) vide judgment dated 22-11-2002 passed in Special Criminal Application No.503 of 2001 has observed as under:

> "Here it is true that the detailed facts are not incorporated in the order itself but when the order is required to be read in light of the

> background of the office notes and other materials on record, it can be said that the order in question is based on objective materials and it seems that the competent authority had objective satisfaction on objective materials and, therefore, it cannot be said that the order is not a speaking one and has been passed without any reason. Therefore, it cannot be said to be illegal on that ground."

The aforesaid view of the learned Single Judge has been confirmed by the Division Bench of this Court (Coram: K.R.Vyas and M.S.Shah,JJ.) vide order dated 18-6-2003 passed in Letters Patent Appeal No.126 of 2003.

26. In view of the aforesaid, it can safely be held that order dated 23-5-2003 Annexure-B issued under Sec.268 of the Code by the State Government is only an administrative order based on objective materials on arriving at a subjective satisfaction and no quasi-judicial element is involved in it and hence, there was no need for the authority to pass a reasoned order incorporating detailed facts and grant of personal hearing to the concerned parties is also not required. Thus, the order Annexure-B passed by the authority cannot be said to be illegal.

27. Regarding the contention made by the learned Senior Counsel, Mr.Vakharia that the order Annexure-B has been passed by the authority for frustrating the provisions of Sec.327 of the Code meaning thereby that in any circumstances it cannot be said to an open Court, it is the contention and argument of learned Addl. Advocate General that prior to this case also, several other cases are being conducted in the jail premises since long and permissions are being granted to enter into the Court subject to search, etc. and, therefore, I am of the opinion that the Special Court sitting in the jail premises would be an open Court as per Sec.327 of the Code.

28. Over and above, by way of this petition, the present petitioners have also raised various other contentions regarding the treatment meted out to them at the time of conducting trial in the Sabarmati Central Jail and also the hardships faced by the advocates and their colleagues coming to defend them and the relatives of petitioners inter alia that they are searched at the time of entry in the jail premises and Clerks of advocates have no access to the Central Jail to accompany the advocates.

29. As regards additional facilities to be provided in the Court premises at the time of conducting the trial, request can be made to the Judge who is presiding over the Special Court which when received shall be decided keeping in mind all other aspects. Learned Addl. Advocate General has stated at the bar that if a request is made before the State Government regarding any grievance, same will be considered by the State authority. In these circumstances, no separate orders are passed by this Court in this proceeding. Regarding search of the concerned persons entering into the jail premises for the purpose of conducting trial, it is stated that if they are required to be searched by the jail authority as per their rules and regulations, then they should voluntarily offer themselves even for their own safety as well as the safety of more than 1500 other prisoners who are kept in Sabarmati Central Jail as undertrial and convicted prisoners.

30. It has been submitted by Mr.Vakharia that consequent upon conducting of trial into Sabarmati Central Jail, petitioners and other accused are not in a position to engage eminent advocates. Same has been dealt with by the State in the reply and, therefore, it is not required to be reproduced here. Still, however, it is stated by the learned Addl. Advocate General that 30 accused have already engaged their advocates and for others, learned advocate, Mr.Y.A.Chaka has already given assurance to the Court that almost all the accused would be represented by the advocates and Court has proceeded in that direction even to provide legal aid to the accused. In these circumstances, nothing is required to be done by this Court in this regard.

31. Having regard to the above facts and circumstances, I am of the opinion that since there is no merit in this petition, this petition is required to be dismissed.

32. This petition is hereby dismissed. Notice is discharged.

(R.P.DHOLAKIA,J.)

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